Nos. 16-74, 16-86, 16-258

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, *et al.*,

Petitioners,

v.

MARIA STAPLETON, *et al.*,

Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, *et al.*,

Petitioners,

v.

LAURENCE KAPLAN,

Respondent.

DIGNITY HEALTH, *et al.*,

Petitioners,

v.

STARLA ROLLINS,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

BRIEF OF CHURCH ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Church Alliance is a coalition of the chief executive officers of thirty-seven denominational benefit programs. These benefit programs include programs associated with mainline and evangelical Protestant denominations, two Jewish movements, and Catholic schools and institutions. They provide retirement and health benefits to more than one million clergy, lay workers, and their family members. The following benefit programs or sponsoring churches are represented within the Church Alliance (originally named the "Church Alliance for the Clarification of ERISA"):

American Baptist Churches in the U.S.A.

Associate Reformed Presbyterian Church

Association of Unity Churches International

Baptist General Conference–Converge Worldwide

Board of Pensions of the Church of God

Christian Brothers Services

Christian Church (Disciples of Christ)

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1. Counsel for *amicus* certifies that no counsel for any party authored this brief, in whole or in part, and that no person or party other than the named *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief, and that all parties have consented to the filing of this brief.

Christian Churches Pension Plan

Christian Reformed Church in North America

Church of God Benefits Board

Church of the Brethren

Church of the Nazarene

Churches of God, General Conference

Community of Christ

Episcopal Church

Evangelical Covenant Church

Evangelical Free Church of America

Evangelical Lutheran Church in America

Evangelical Presbyterian Church

Free Methodist Church of North America

General Conference of Seventh-Day Adventists

International Church of the Foursquare Gospel

Joint Retirement Board for Conservative Judaism

Lutheran Church-Missouri Synod

Mennonite Church

National Association of Free Will Baptists

Presbyterian Church (U.S.A.) Board of Pensions

Presbyterian Church in America

Reform Pension Board

Reformed Church in America

Southern Baptist Convention

Unitarian Universalist Association

United Church of Christ

United Methodist Church

Wesleyan Church

Wisconsin Evangelical Lutheran Synod

Young Men's Christian Association

The Church Alliance is uniquely situated to submit an *amicus* brief in support of petitioners. At the heart of these cases lies the current definition of "church plan" in section 3(33) of the Employee Retirement Income Security Act of 1974 (hereinafter, "ERISA"), 29 U.S.C. § 1002(33) (2012), which reflects an amendment Congress made in 1980 at the urging of the Church Alliance. That amendment, largely

authored by Church Alliance representatives, was drafted in part to enable the retirement and other employee benefit plans of church "agencies" to continue to have church plan status. The term "agencies" was not defined, but was understood to cover all church-affiliated entities that were not local houses of worship. The decisions of the Courts of Appeals below completely undo the Church Alliance's efforts that secured that amendment.

SUMMARY OF ARGUMENT

Churches are governed and structured in two principal ways: either hierarchically, through top-to-bottom control, or congregationally, through the voluntary cooperation and association of churches and associated agency organizations. In both the original version of the ERISA church plan definition[2] and as amended by the Multiemployer Pension Plan Amendments Act of 1980[3] ("MPPAA"), Congress was careful to accommodate both types of church polity—thereby avoiding Constitutional challenges based on the government favoring one form of religious structure over another. If this Court upholds the decisions of the Courts of Appeals in these cases, benefit plans associated with many hierarchical churches[4] will

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2. Pub. L. No. 93-406, Title I, § 3(33).

3. Pub. L. No. 96-364, § 407(a).

4. Unless provided otherwise, the word "church" as used in this brief, includes a "convention or association of churches" (often conversationally referred to as a "denomination"). This latter phrase has historically been used by Congress to refer to the organizational structures of congregationally governed churches. Thus, the inclusion of that phrase together with the word "church" in ERISA's "church plan" definition and other federal statutes is intended to

be entitled to church plan status because they have been established by the church. However, in many other cases, particularly in the case of congregationally governed churches, which includes many Protestant churches and Jewish movements, the benefit plans of church-associated agencies will not be entitled to church plan status because these plans are established by the church agencies themselves, and not by the particular church with which they are associated. This would impermissibly and unconstitutionally favor one form of church structure (hierarchical) over another (congregational), thus violating the Establishment Clause.[5]

Affirming the decisions of the Courts of Appeals will also affect the application of numerous other federal laws

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afford congregationally governed churches the same treatment afforded hierarchical churches. *See Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1288 (8th Cir. 1985).

5. *Id.* at n.5:

> We necessarily construe the word "church" in [Code] section 6033 to include both organizational forms of churches with respect to "churches and their integrated auxiliaries." Any other construction of the phrase--i.e., if "church" were construed as meaning only hierarchical churches such as the Catholic Church--would result in an unconstitutional construction of the statute because favorable tax treatment would be accorded to hierarchical churches while being denied to congregational churches, in violation of the first amendment. Courts should avoid construing statutes in ways that would render them unconstitutional, particularly in cases such as this where Congress clearly sought to equalize tax treatment among religions. ...

to employee benefit plans established by church agencies, with potentially devastating financial and other effects on the agencies and their employees.

The better reading, the one urged by the petitioners and the Church Alliance, will avoid these problems—and at the same time properly reflect the solution to the church agency problem that the MPPAA church plan changes were designed to correct—all without violating the Establishment Clause.

ARGUMENT

I. MPPAA's Changes to the ERISA Church Plan Definition Were Intended to Permit the Employee Benefit Plans of a Church-Associated Employer to Have Church Plan Status, Even if Established by a Church-Associated Employer and Not by a Church.

A. The Original Church Plan Definition in ERISA Recognized the Different Ways in Which Churches are Structured or Voluntarily Cooperate.

In adopting ERISA in 1974, Congress was careful to treat congregational denominations the same as hierarchical ones. In exempting church plans, it exempted plans established by "churches," along with plans established by "conventions or association of churches." Congress first used the phrase "convention or association of churches" in 1950 when it imposed a tax on unrelated business income ("UBIT") for certain classes of organizations that were otherwise exempt from federal income tax under section 501(a) of the Internal Revenue

Code (hereinafter, the "Code"), 26 U.S.C. § 501(a) (2012). Congress generally subjected to UBIT all organizations exempt from federal taxation under section 501(c)(3), 26 U.S.C. § 501(c)(3) (2012), except churches or conventions or associations of churches.

The Senate added the phrase "conventions or associations of churches" to the UBIT legislation at the urging of Baptist leaders who feared the unmodified word "church" used in the House's version of the bill would be interpreted to include only hierarchical organizations and exclude congregational churches in which each local church is autonomous and there is no canonical structure uniting them into one organization. A Baptist spokesperson proposed an exemption for "autonomous individual churches alone or cooperating together by means of a convention or other form of cooperative religious organization controlled by or principally supported by such independent churches." *Hearings on H.R. 8920, Before the S. Comm. on Fin.*, 81st Cong., 216 (1950). The Senate Finance Committee amended the legislation by adding the phrase "convention or association of churches," thereby including in the UBIT exemption congregational churches and their cooperative endeavors. Charles J. Whelan, *"Church" in the Code: the Definitional Problems*, 45 Fordham L. Rev. 885, 903 n.80 (1977). Since then, Congress has frequently used the phrase "church or convention or association of churches" in various contexts to provide equal treatment for congregational and hierarchical churches.

B. MPPAA's Changes to the Church Plan Definition Ensured that Benefit Plans of Church-Associated Employers Would Continue to Have Church Plan Status, Even if the Plans Were Established by the Church-Associated Employer and Not by a Church.

Although the church plan definition originally included in ERISA took into account the different polities adopted by churches, it nevertheless left "many technical problems" for the religious community. 124 Cong. Rec. 12,107 (Statement by Sen. Conable) (May 2, 1978). A fundamental problem was that ERISA's church plan definition did not define what constituted a "church," which raised two concerns. First, because a church plan had to be established and maintained by a "church," it was unclear which religious organizations could establish and maintain a church plan. Second, because a church plan could cover only employees of a "church," it was unclear which employees could participate in a church plan.

The religious community was concerned—appropriately, as it turned out—that this meant the government would decide what is a church is, i.e., what entities were part of a church for these purposes, perhaps without appreciating the various ways in which churches are structured. To understand the religious community's concern, it is important to understand the two primary ways in which church benefit plans and programs are structured.

In the case of a church whose polity is hierarchical, the church itself typically establishes the employee benefit plans in which local houses of worship, or "steeples,"

and church agencies participate for the benefit of their workers. In these cases the churches typically require all "steeples" and some if not all church agencies to participate in such plans—going elsewhere for employee benefits is not an option.

In the case of churches with congregationally governed polities, which includes many Protestant denominations and Jewish movements, church agencies (and usually even the "steeples") are completely autonomous in their operations and generally free to establish their employee benefit plans with any benefit plan provider of their choosing, with one provider option often being a benefit board or program established by the church. This is true today, was true in 1974 when ERISA was enacted, and was true in 1980 when MPPAA was passed.

1. 1977

The concerns of the religious community were highlighted in 1977 with the issuance of proposed regulations under Code section 414(e), 26 U.S.C. § 414(e) (2012), the Internal Revenue Code counterpart to ERISA section 3(33), 29 U.S.C. § 1002(33) (2012). The proposed regulations provided that a plan established by a religious order or religious organization could be a church plan only if the religious order or religious organization was "(1) an integral part of a church, and (2) engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise." 26 C.F.R. § 1.414(e)-1(e), 42 Fed. Reg. 18,621-23 (proposed Apr. 8, 1977).

The full impact of the proposed regulations became clear later in 1977 when the IRS issued General Counsel

Memorandum 37,266, I.R.S. Gen. Couns. Mem. 37,266, 1977 WL 46200 (Sept. 22, 1977). G.C.M. 37,266 held that two pension plans sponsored by Catholic religious orders of women for the benefit of the employees of the hospitals they operated were not church plans. The IRS held that although the orders were integral parts of the Catholic Church, they did not satisfy the second part of the test under the proposed regulations because they were not principally involved in carrying out the functions of a church, such as the "ministration of sacerdotal functions and conduct of religious worship." *Id.* at *5-6. Consequently, the IRS ruled that their plans could not be church plans.

2. 1978-79

As might be expected, various church organizations petitioned Congress and pointed out that the church plan definition under the proposed regulation, and as interpreted by the IRS in GCM 37,266, left it to the government, rather than churches, to define what comprises a church and how a church may carry out its mission. As the result of those efforts, in 1978 Representative Barber Conable introduced H.R. 12172 and H.R. 12312 and Senator Herman Talmadge introduced S. 3172 and S. 3182 in the 95th Congress. Those companion bills would have revised ERISA section 3(33) and Code section 414(e) to include the following provision:

> A plan established and maintained by a church or by a convention or association of churches shall include a plan established and maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function

> of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

H.R. 1272, 95th Cong. (1978); H.R. 12312, 95th Cong. (1978); S. 3172, 95th Cong. (1978); S. 3182, 95th Cong. (1978).

In support of H.R. 12172, Representative Conable stated:

> The combined effect of these provisions is to treat both hierarchical and congregational denominations in the same manner for purposes of the church plan definition. The bill, thus, accommodates the differences in beliefs, structures, and practices among our religious denominations.

124 Cong. Rec. 10,107 (May 2, 1978).

These bills were not passed during the 95th Congress, but the Church Alliance and its members continued their legislative efforts in the 96th Congress. For example, the Southern Baptist Convention objected that the IRS was "presuming to define what is and is not part of these religious groups' mission," 125 Cong. Rec. 10,056 (May 7, 1979), and the General Conference of Seventh Day Adventists called the IRS position "a violation of the principle of separation of church and state that has

characterized our nation from the beginning." *Id.* at 10,057.[6] The comments by the religious community—like their comments on the proposed regulations under Code section 414(e)—did not focus on which entities could "establish" or "maintain" a church plan. Rather, they urged that "church agencies" be recognized as part of a church.

Representative Conable and Senator Talmadge reintroduced their bills in the 96th Congress as H.R. 1576 and 1578, and S. 1090 and 1091. These bills sought to clarify what constitutes a "church" by providing that a church agency is considered part of a church:

> The term "agency" of a church is also defined in our legislation as an exempt organization which is either controlled by or associated with a church or a convention or association of churches. We further provide that an organization is "associated" with a church or a convention or association of churches if it shares common religious bonds and convictions with that church.

125 Cong. Rec. 10,053 (May 7, 1979) (Statement of Sen. Talmadge).

The Courts of Appeals below found that these bills were intended only to clarify who could participate in a church plan, not which religious organizations could

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6. *Accord id.* at 10,054 (Statement of Rabbinical Pension Bd.); *id.* at 10,055 (Statement of Am. Lutheran Church); *id.* at 10,056 (Christian Reformed Church).

establish and maintain a church plan. *Kaplan v. St. Peter's Healthcare System*, 810 F.3d 175, 184 (3d Cir. 2015); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 528 (7th Cir. 2016); *Rollins v. Dignity Health*, 830 F.3d 900, 907 (9th Cir. 2016). But Senator Talmadge had made clear that church agencies, such as church-affiliated hospitals, elder care facilities, children's homes, and other mission organizations, were part of a church because the services they provided were an essential part of their religious mission:

> Church agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. *They are, in fact, part of the churches.*

125 Cong. Rec. 10,052 (May 7, 1979) (Statement of Sen. Talmadge) (emphasis added).

In referring to church agencies that "care for the sick and needy" as being part of a church, Senator Talmadge was clearly countering the IRS's position in GCM 37,266 that the plans at issue there were not church plans because the services rendered by hospitals were non-sacerdotal and therefore not truly religious. *See* 1977 WL 46200 at *5.

3. 1980

In early 1980 the proposed regulations under Code section 414(e), 26 U.S.C. § 414(e), were finalized with no changes in the two-part test. 26 C.F.R. §1.414(e)-1, 45 Fed. Reg. 20,796 (March 31, 1980).

The Church Alliance's legislative efforts finally bore fruit in MPPAA when the church plan definition

was broadly revised. The breadth of the changes was purposeful. Church Alliance representatives knew, as did the members of Congress, that the relief provided could not discriminate among different church plans and programs and the employers participating in such programs—or the legislation would be unconstitutional.[7] As explained below, a restrictive reading of the church plan definition results in different outcomes on church plan status, depending on whether the employer is part of a hierarchically governed church or a congregationally cooperating convention or association of churches and church agency organizations[8]—the very thing Congress properly sought to avoid in amending the church plan definition in MPPAA.

II. The Plain Text of ERISA Permits Church Agencies to Establish Church Plans.

A church plan under ERISA section 3(33)(A), 29 U.S.C. § 1002(33)(A) (2012), includes a plan described in section 3(33)(C)(i) (2012), 29 U.S.C. § 1002(33)(C)(i). As noted in *Overall v. Ascension*:

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7. A thumbprint of Constitutional concern is found in the provision in the church plan definition that deems the employees of church-controlled or associated employers to be church employees. The reference to organizations "controlled by or associated with" ensured that the employees of employers within either a hierarchically governed church ("controlled by") or a congregationally associated church convention or association ("associated with") would be treated as church employees—as demanded by the Constitution; 29 U.S.C. § 1002(33)(C)(ii)(II) (2012). See *supra* note 5.

8. For purposes of this brief, a "church agency organization" or "church agency" means an organization or other entity controlled by or associated with a church or a convention or association of churches within the meaning of ERISA section 3(33).

> Section (C) says that "A plan established and maintained...by a church **includes** a plan [meeting the requirements of section (C)(i)]." As Ascension puts it "under the rules of grammar and logic, A is not a 'gatekeeper' to C; rather if A is exempt and A includes C, then C is also exempt." (Doc. 71 at p. 2). This is how the Court interprets section (C).

23 F.Supp. 3d 816, 828 (E.D. Mich. 2014).

If Congress intended that subsection (A) have the "gatekeeper" effect suggested by plaintiffs, it could have said in subsection (C) that "a plan *maintained* by a church includes . . . ." However, it did not—it said that "a plan *established and maintained* includes . . . ."—a distinction that cannot be ignored.

III. Congress' Use of the Word "Includes" Elsewhere in ERISA Confirms It Intended that Church Agencies be Able to Establish Church Plans.

Under the rule of consistent usage, Congress is presumed to have used the same term consistently within a statute. A similar provision regarding the ERISA exemption for "governmental plans" makes clear that when Congress "includes" additional plans within an ERISA exemption provision, it intends such additional plans to be covered by the exemption.

ERISA also does not apply to "governmental plans." 29 U.S.C. § 1003(b)(1) (2012). ERISA defines a governmental plan as "a plan established or maintained for its employees by the Government of the United States,

by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing." 29 U.S.C. § 1002(32) (2012). It goes on to "include" as governmental plans:

- certain plans to which the Railroad Retirement Act of 1935 or 1937 applies; and

- plans of international organizations exempt from taxation under the provisions of the International Organizations Immunities Act.[9]

In 2006 Congress amended section 3(32) to "include[]" as "governmental plans" certain plans "established or maintained" by Indian tribal governments or subdivisions, agencies, or subdivisions thereof and did so by merely adding a sentence to that effect to the end of section 3(32).[10]

The initial text in section 3(32) regarding plans "established or maintained" cannot serve as a gatekeeper for the governmental plan exemption because sponsors of those plans could neither establish nor maintain a plan that would qualify as a governmental plan without

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9. 29 U.S.C. § 1002(32) (2012). For a list of such organizations, see https://www.gpo.gov/fdsys/pkg/USCODE-2014-title22/pdf/USCODE-2014-title22-chap7-subchapXVIII.pdf (last visited January 15, 2017).

10. Pension Protection Act of 1986, Pub. L. No. 109-280, § 906(a). Before the 2006 amendment, the Seventh and Ninth Circuits held that ERISA applies to plans established and maintained by Indian tribes. *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989).

the special inclusion provision.[11] Thus, Congress clearly intended these types of plans to be "governmental plans" exempt from ERISA. Similarly, when Congress provided in ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012), that a "church plan" includes plans "maintained" by certain church-affiliated organizations, it intended to extend the church plan exemption to such plans.

Congress also used the term "includes" elsewhere in ERISA to cover items that otherwise might not be encompassed by a definition. For example, ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2) (2012), provides that for purposes of ERISA's preemption provision:

> The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

This Court has construed this provision as expanding the definition of "State" for preemption purposes to include state agencies and instrumentalities "whose

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11. It is not clear that Congress intended this discrepancy in wording between plans "established or maintained" in some provisions of ERISA, but "established and maintained" in others. *See Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987) (discussing unexplained and apparent inadvertent wording discrepancies between Code section 414(d) and ERISA section 4021(d), which require a governmental plan to be "established and maintained" by a governmental organization and ERISA section 3(32), which requires only that it be "established or maintained" by a governmental organization).

actions might not otherwise be considered state law" using ERISA's general definition of "State" in 29 U.S.C. §1002(10). *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 141 (1990).

IV. The Legislative History of MPPAA Confirms That Congress Intended that Church Agencies Can Establish Church Plans.

An early version of what would eventually become MPPAA stated that a plan "established and maintained by a church . . . includes a plan *established and* maintained" by an organization described in Code section 414(e)(3)(A), 26 U.S.C. § 414(e)(3)(A) (2012). 124 Cong. Rec. 12,108 (May 2, 1978). The final version of MPPAA deleted the second "established and" from the amendments to Code section 414(e)(3)(A), 26 U.S.C. § 414(e)(3)(A) (2012), and ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012). The Court of Appeals in *Stapleton v. Advocate Healthcare Network* found that this change evidenced a Congressional intent that an organization under ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012), can "maintain" but not establish a church plan. 817 F.3d 517, 528 (7th Cir. 2016). However, the elimination of the word "established" from what was to become ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012), was intended to *expand* the original proposal.

It is easy to understand the reason for the expansion. Under the original proposal, in order for a plan to be a church plan, it had to be either (i) established and maintained by a church; or (ii) established and maintained by a church agency. But reflecting the vast diversity of church structures in the United States, plans established

by religious organizations do not fall neatly into one of these two categories. Some may be (i) established by a church, but maintained by a church agency; (ii) established by one church agency, but maintained by another church agency; or (iii) established by a church agency, but maintained by a church.

With the passage of MPPAA, Congress effectively replaced the two-part test under the regulations issued under Code section 414(e), 26 U.S.C. § 414(e) (2012), with the "controlled by or associated with" standard. The new expanded definition of "church plan" encompassed both hierarchically governed churches and congregationally associated church conventions or associations, thus correcting the Constitutionally problematic two-part test under the regulations issued under Code section 414(e), 26 U.S.C. § 414(e) (2012), that favored hierarchically governed churches.

In December 1979, a Subcommittee of the Senate Finance Committee held a hearing at which Daniel I. Halperin, Deputy Assistant Secretary of the Treasury stated:

> we see no justification for expansion of the complete exemption from ERISA from churches to church-related agencies. Therefore, we have opposed S. 1090 as it stands.

Hearings Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Senate Finance Committee, 96th Cong., 1st Sess. 190 (Dec. 4, 1979).

At a mark-up session of the Senate Finance Committee in 1980, Mr. Halperin reiterated Treasury's "most serious concern" that the bill would exempt plans of church-affiliated hospitals and schools from ERISA's coverage:

> What that bill would permit, it would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to provide no retirement benefits unless they work until age 65, for example.

Exec. Sess. of S. Comm. on Fin., 96th Cong. 41 (June 12, 1980).

In response to Treasury's objections to the revised church plan exemption, Senator Talmadge stated that this raised questions of separation of church and state and he called for a vote on the expanded exemption. The reaction was a "chorus of ayes" with no opposition. *Id.* at 41-42.

Finally, like Treasury, Senator Jacob Javits (the key legislative "father" of ERISA) was "not too happy" about the expansion of the "church plan" exemption to "exempt[] those who work for schools and similar institutions which are church-related." 126 Cong. Rec. 20,180 (July 29, 1980) (Statement of Sen. Javits). However, he noted that to get a bill passed he reluctantly had to concede on some things, this being one. *Id.*

The proposed legislation, which was included in MPPAA, put congregational churches on the same footing as hierarchical ones. As noted earlier, while hierarchical churches could establish church plans at the church level,

the polity of many congregational churches precluded such centralization. In congregational churches, the plans would typically be established by affiliated organizations that were either "controlled by or associated with the church."

V. The Agencies Have Correctly Interpreted ERISA to Permit Church Agencies to Establish Church Plans

After Congress passed MPPAA (despite Treasury's concerns), the IRS revoked its pre-MPPAA guidance in G.C.M. 37,266 with the issuance of General Counsel Memorandum 39,007, 1983 WL 197946 (Nov. 2, 1982).[12] In G.C.M. 39,007, the IRS examined the text of the expanded "church plan" exemption and concluded that plans at issue in G.C.M. 37,266 of organizations controlled by or associated with churches could be "church plans." *Id.* at *2–6. As a result of this conclusion, it revoked GCM 37,266 on the ground that it was "obsolete":

> In short, because of the passage of the MPPA, church plan status no longer hinges on whether an order is a church. Therefore, although the test articulated in * * * G.C.M. 37,266 is correct as to whether the order is a church, that issue is no longer determinative as to whether the employees of the order are eligible for coverage

12. G.C.M. 39,007 was issued just a little over two years after MPPAA's enactment. However, the IRS no doubt began its work on reviewing G.C.M. 37,266 well before its revocation, and IRS personnel involved in the issuance of G.C.M. 39,007 no doubt consulted with Treasury representatives in discerning Congress's intent in connection with the church plan definition changes.

> by a church plan. Therefore, * * * G.C.M. 37,266, I-24-77 (September 22, 1977) is revoked on the ground that it is obsolete.

Id. at *6.

The IRS based its guidance on the newly added exemption in Code section 414(e)(3)(A), 26 U.S.C. § 414(e)(3)(A) (2012)—the identical Code counterpart to ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012)—which provided that the definition of "church plan" includes plans maintained by organizations that are "controlled by or associated with a church or a convention or association of churches." *Id.* at *7. The IRS also cited Senator Javits' floor statement to note that, as amended, the "church plan" exemption is no longer limited to plans of churches. *Id.* at *6, n.1.

Since 1983, the IRS has continued to interpret the church plan definition as it interpreted it in G.C.M. 39,007 in literally hundreds of private letter rulings issued to organizations seeking an IRS determination on the church plan status of their benefit plans.

VI. Since 1983 Congress Has Ratified the Longstanding IRS and Department of Labor Interpretation of the Church Plan Definition by Continuing to Use and Refer to that Definition—Without Change—in a Variety of Other Laws.

As this Court noted in *Lorillard v. Pons*:

> Congress is presumed to be aware of an administrative or judicial interpretation of a

> statute and to adopt that interpretation when it re-enacts a statute without change. . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

434 U.S. 575, 580–81 (1978).

Congress has revised the definition of "church plan" in Code section 414(e), 26 U.S.C. § 414(e) (2012), the counterpart to ERISA section 3(33), 29 U.S.C. § 1002(33) (2012), twice since the passage of MPPAA in 1980, and in neither case did it counter the then long-standing and consistent determinations by the IRS and the Department of Labor that church plans could include plans established by church-affiliated organizations described in ERISA section 3(33)(C)(i), 29 U.S.C. § 1002(33)(C)(i) (2012), and Code section 414(e)(3)(A), 26 U.S.C. § 414(e)(3)(A) (2012).[13]

Additionally, since the passage of MPPAA in 1980, Congress has enacted a variety of legislation referencing the church plan definition in ERISA section 3(33), 29 U.S.C. § 1002(33) (2012), or its counterpart, Code section 414(e), 26 U.S.C. § 414(e) (2012). In view of the legislative history

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13. The Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1461(a), added section 414(e)(5) to the Code to provide a special provision for contributions to tax-qualified retirement plans on behalf of ministers engaged in exercise of agency outside the bounds of their respective churches (e.g., chaplains) and self-employed ministers. Congress subsequently amended that provision with the passage of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 1601(d)(6)(A), 1522(a)(1)–(2).

cited above, Congress' continued incorporation of the statute demonstrates its original intent and concurrence with agency interpretation and implementation of the provision. In each of the following statutes, Congress continued to employ the same language without changing the IRS's interpretation of the term "church plan":

1990 Excluded church plans from the requirement to provide health continuation coverage under 26 U.S.C. § 4980B. *See* 26 U.S.C. § 4980B(d)(3) (2012).

1996 Added § 3(c)(14) to the Investment Company Act of 1940 to exclude from the definition of "investment companies" under that Act church plans and certain accounts that consist substantially of church and church plan assets. *See* 15 U.S.C. § 80a-3(c)(14) (2012).

Added § 3(a)(13) to the Securities Act of 1933 to exclude any security issued by or any interest or participation in any church plan from regulation under that Act. *See* 15 U.S.C. § 77c(a)(13) (2012).

Added § 3(g) to the Securities Exchange Act of 1934 to exclude church plans from the broker-dealer provisions of that Act. *See* 15 U.S.C. § 78c(g) (2012).

Amended § 304(a)(4)(A) of the Trust Indenture Act of 1939 to exclude church plans from the requirements of that Act. *See* 15 U.S.C. § 77ddd(a)(4)(A) (2012).

Added § 203(b)(5) to the Investment Advisers Act of 1940 to exclude from the requirements of that Act church plans, organizations that establish and maintain church plans, and trustees, directors, officers, employees or volunteers of such plans or organizations. *See* 15 U.S.C. § 80b-3(b)(5) (2012).

Excluded church plans from the minimum excise tax that otherwise applies to health benefit plans that do not meet certain general requirements. *See* 26 U.S.C. § 4980D(b)(3)(C) (2012).

Adopted a special rule for church plans in complying with provisions prohibiting discrimination by group health plans based on health status. *See* 26 U.S.C. § 9802(f) (2012).

2000 Enacted the "Church Plan Parity and Entanglement Prevention Act" to amend ERISA to preempt certain state insurance requirements from applying to certain "church plans." *See* 29 U.S.C. § 1144a (2012).

2001 Excluded defined benefit church plans from the requirements to notify participants in advance of benefit accrual reductions. *See* 26 U.S.C. § 4980F(f)(2) (2012).

VII. Permitting Church Agencies to Establish Church Plans is Consistent with Interpretations by the Internal Revenue Service and Department of Labor.

While ERISA's church plan definition clearly permits church agencies to establish church plans, should this

Court find the definition ambiguous, this Court should defer to the interpretation of the definition applied by the IRS in hundreds of private letter rulings and by the Department of Labor in numerous advisory opinions. When a statute does not compel a particular disposition of an issue, a court can review an agency's formal interpretation of a statute that it administers and defer to any reasonable interpretation of that statute. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In addition, agency interpretations that are not the result of a formal and public process can be reviewed under the pre-Chevron principles in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, agency determinations not entitled to *Chevron* deference are nonetheless "entitled to respect."

VIII. Permitting Church Agencies to Establish Church Plans Avoids Constitutional Concerns.

The interpretation of ERISA's "church plan" exemption urged by petitioners also avoids rendering the church plan definition unconstitutional by treating plans established for employees of hierarchical churches and their affiliates the same as plans established for employees of congregational churches and their affiliates. Of course, this Court must avoid construing statutes in a manner that would create constitutional problems. *See, e.g., DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 575 (1988).

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the National Labor Relations Board argued that schools operated by churches had violated the National Labor Relations Act ("NLRA") by refusing to recognize

or bargain with unions representing lay faculty members. In interpreting the NLRA, this Court determined that, where an otherwise acceptable construction of a statute would raise serious First Amendment problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to Congress's intent. *Id.* at 499–501.

IX. Permitting Church Agencies to Establish Church Plans Avoids Having to Determine When a Church Agency is Part of a "Church" for Purposes of the Exemption.

If a "church plan" under ERISA must be established by a "church", then when is an agency of a church, such as a church agency, part of the "church" for this purpose?

Answering this question puts one on a slippery slope. As mentioned above, one of the problems the religious community had with the original, pre-MPPAA church plan definition was that it created two classes of "church citizens"—"steeples," whose benefit plans (or a multiple employer plan in which they participated) were entitled to church plan status, and church "agencies," whose plans were not. The two-part test under 26 C.F.R. § 1.414(e)-1(e), discussed earlier, avoided this problem for some hierarchical churches, but not for some congregationally organized churches. The church plan definition as revised by MPPAA and the manner in which it has been interpreted by the IRS for 30-plus years solves the problem.

The constitutional avoidance rule of statutory construction, discussed above, may again prove useful to this Court because the long-standing interpretation

placed on the church plan definition by the IRS, and by petitioners, amicus, and the religious community, is a reasonable way to interpret ERISA's "church plan" definition without having to answer the question: "What is a 'church'?"

X. ERISA's Church Plan Exemption Does Not Violate the Establishment Clause.

This Court has never interpreted the Establishment Clause as preventing legislatures from enacting laws with special reference to religion. Indeed, such an interpretation is belied by the very language of the First Amendment, which singles out "religion" for special treatment under both the Free Exercise and Establishment Clauses. *See Thomas v. Review Bd. of the Ind. Empt. Sec. Div.*, 450 U.S. 707, 713 (1981). It often is legitimate (and sometimes is constitutionally required) for legislatures to take the special needs and circumstances of religion into account in drafting laws. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971). Thousands of state and federal laws "single out" religion for special treatment. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-49 (1992) (citing more than 2,000 legislative accommodations of religion in federal and state law).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-prong test for determining whether a legislative act can withstand an Establishment Clause challenge: (1) it must have a secular purpose;

(2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. *Id.* at 612-13.

A. ERISA's Church Plan Exemption Has a Secular Purpose.

The "secular purpose" test "aims at preventing the relevant governmental decisionmaker . . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335; *See* Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 89 (2002) (interpreting the secular-purpose requirement as meaning "that government may not declare religious truth"). A statute is not unconstitutional under this test merely because it provides a "benefit" to religion (even intentionally), but "only when ... there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

There can be no doubt that Congress intended the MPPAA amendments to ERISA's "church plan" definition to alleviate a burden on religious institutions, both by overruling the IRS policy of deciding whether hospitals and schools were connected closely enough to the central function of religious worship, and by relieving such institutions of the burden of ERISA compliance. 125 Cong. Rec. 10,052-58 (May 7, 1979) (Statement of Sen. Talmadge).

B. ERISA's Church Plan Exemption Does Not Have the Primary Effect of Advancing Religion.

This nation has a long history of exempting certain religious activities from regulation. These exemptions are best understood as a way of leaving churches alone—of neither advancing nor inhibiting their activities. Such exemptions do not violate the Establishment Clause. *See, e.g., Amos,* 483 U.S. 327 (finding exemption for religious organizations in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 from Title VII's general prohibition against religious discrimination did not violate the Establishment Clause).

ERISA's church plan exemption is not like the Texas statute struck down in *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), that exempted from state sales and use taxes "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith" *Id.* at 5. Rather, it is comparable to the property tax exemption upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), that exempted property used for religious purposes together with property used for charitable, educational, and other purposes. Church plans are not the only employee benefit plans Congress excluded from ERISA's reach. Congress also excludes four other types of plans: (i) governmental plans; (ii) plans maintained to comply with workmen's compensation, unemployment or disability insurance laws; (iii) certain foreign plans; and (iv) unfunded excess benefit plans. 29 U.S.C. § 1003(a)(2012).

C. ERISA's Church Plan Exemption Does Not Foster Excessive Government Entanglement with Religion.

Congress originally exempted church plans from ERISA apparently to avoid First Amendment challenges based on entangling governmental regulations. Peter J. Wiedenbeck, *ERISA's Curious Coverage*, 76 Wash. U.L.Q. 311, 348 (1998). The legislative history of MPPAA indicates that the changes to the definition of "church plan" made by that Act were intended to make the definition more inclusive of all churches. 125 Cong. Rec. 10,052 (May 7, 1979) (statement of co□sponsor Sen. Talmadge) (criticizing the original definition as "so narrow that it almost completely fails to consider the way our church plans have for decades operated."). As amended, the definition *reduces* government entanglement because it eliminates the need to determine when an organization is part of a church or an association or convention of churches.

CONCLUSION

Congress intentionally designed the church plan definition to be applied broadly and flexibly to account for the many and varied types of religious organizations pursuing their respective religious convictions and beliefs in the United States. The hallmark of congregationally governed church conventions and associations is that each organization that voluntarily associates with it is an autonomous decision-making entity. Construing the church plan definition in a way that would treat plans established by employers within a congregationally governed church convention or association differently than plans established by a hierarchically governed church

would violate the Establishment Clause and unnecessarily entangle the government with religion.

Upholding these decisions will disrupt the meaning of numerous other federal laws referencing "church plans." For example, church agencies sponsoring such plans could be subject to a host of *per diem* penalties for violating ERISA's reporting and disclosure requirements. *See U.S. Dep't of Labor Emp. Benefits Sec. Admin., Reporting and Disclosure Guide for Employee Benefit Plans*, (Sept. 2014), *available at* https://www.dol.gov/ebsa/pdf/rdguide.pdf. In addition, they could have violated various federal securities laws for not having registered interests in church retirement plans as securities or themselves as investment advisers.

The loss of church plan status could also cause many retirement plans sponsored by religious organizations to lose their qualified tax status under Code section 401, 26 U.S.C. § 401 (2012), with potentially disastrous consequences for the employees participating in such plans. Brief of Church Alliance as *Amicus Curiae* in Support of Petition for Certiorari 5-11.

Finally, this is not just a case about pension plans maintained by hospitals. The decisions of the Third, Seventh, and Ninth Circuits impact all types of employee benefit plans maintained by a variety of church-affiliated employers that have all established their own plans. Affected employers include children's homes, Bible colleges and seminaries, retirement centers and nursing homes, summer camps and church conference centers, and social service organizations (e.g., immigration counseling services, senior adult ministries, and food banks and

cooperatives)—and the plans affected include not just defined benefit retirement plans like the ones involved in this case, but also defined contribution retirement plans (including plans intended to qualify under Code sections 401(k) or 403(b), 26 U.S.C. §§ 401(k) and 403(b)) and welfare benefit plans (e.g., health, death benefit, and disability).

The employers in this case and the church benefits community have relied on the IRS's 30-plus years of consistent interpretation of the MPPAA church plan definition in exactly the manner that the Church Alliance submits that it should be interpreted. The IRS got it right in 1983. The Third, Seventh, and Ninth Circuits did not.

For all of these reasons, the judgments of the Courts of Appeal should be reversed.

Respectfully submitted,

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